STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2005
v	No. 252737 St. Clair Circuit Court
RAMON LAVIN RUSSELL, Defendant-Appellant.	LC No. 03-000510-FC

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant Ramon Lavin Russell appeals as of right from his jury trial convictions of armed robbery, MCL 750.529, possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), third-degree fleeing and eluding, MCL 750.479a(3), and two counts of attempting to take a firearm from a peace officer, MCL 750.479b(2). We affirm.

I

First, defendant argues that trial counsel was ineffective by failing to request severance of the armed robbery, fleeing and eluding, and attempting to take a firearm from a peace officer charges. We disagree.

To establish an ineffective assistance of counsel claim, a defendant must show: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing norms, and (2) counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, *supra* at 694. Because no testimonial record was created below, our review is limited to deficiencies apparent from the record. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant argues that defense counsel should have moved to sever as the charges occurred at different times and were allegedly unrelated. Under MCR 6.120(B), a court must sever unrelated offenses on a defendant's motion. However, offenses are related if they are

based on "(1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan." *Id.*

Defendant relies on *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977), wherein our Supreme Court found two heroin sales twelve days apart to constitute unconnected acts entitling the defendant to separate trials. *Id*. at 152. However, *Tobey* is distinguishable from the present case. In *Tobey*, each drug sale was a similar but separate act because each transaction was completely concluded before another was initiated. *Tobey*, *supra* at 149-152. Here, despite defendant's argument that he might not have fled the police because of the armed robbery, the armed robbery set all of the relevant events into motion: the police initially attempted to stop defendant because of the armed robbery, and, based on evidence collected by Officer Sickle, at that time defendant was still carrying DeVooght's checkbook and personal belongings. Thus, defendant's acts were not disconnected transactions, but were part of a continuing sequence of related events. Indeed, our Supreme Court in *Tobey* stated "if a person were to escape prison, steal an automobile and take hostages, all the offenses might be tried together as a series of connected acts." *Id*. at 152. Defendant's argument that the span of two days cuts off the relationship between his acts runs contrary to our Supreme Court's statement that "joinder is allowed for offenses which are part of a single scheme, even if considerable time passes between them." *Id*. at n 15.

Severance was not required in this case because the charges were related. Therefore, failure to move for severance did not constitute ineffective assistance of counsel because "counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

II

As his second issue, defendant challenges the scoring of several offense variables. Defendant argues that the factual findings supporting any offense variable scores should have been determined by a jury. Although the United States Supreme Court has recently struck down determinate sentencing schemes as unconstitutional infringements on the role of the jury as factfinder, the Court expressly stated that *in*determinate sentencing schemes were not affected by its holding. *Blakely v Washington*, ___ US ___; 124 S Ct 2531, 2537, 2540, 2543; 159 L Ed 2d 403 (2004). Because Michigan employs a constitutional indeterminate sentencing scheme, *Blakely* is not controlling. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Defendant also argues that OV 3 should have been scored at five points instead of ten because there was no evidence that the victim's injuries required medical treatment. MCL 777.33. Defendant's basis for this argument is that the victim apparently did not *seek* medical treatment. The requirement of medical treatment "refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). In light of the testimony that defendant struck the victim on the head several times with the butt of a handgun and that the victim suffered head injuries, the trial court did not err in scoring OV 3.

Next, defendant argues that OV 19 should have been scored at zero points instead of fifteen because his actions toward police officers did not constitute interference with the administration of justice under MCL 777.49. Recently, our Supreme Court overruled *People v Deline*, 254 Mich App 595, 597-598; 658 NW2d 164 (2002), holding that this Court "ignored the

significance of the words used by the Legislature in MCL 777.49 and 'equated interfered with or attempted to interfere with the administration of justice' with 'obstruction of justice.'" *People v Barbee*, 470 Mich 283, 287; 681 NW2d 348 (2004). Our Supreme Court concluded that law enforcement officers and investigation of a crime are both critical components of the administration of justice, not "just the actual judicial process." *Id*. at 287-288. Thus, an attempt to evade the police constitutes interference with the administration of justice.

Defendant also argues that OV 1 and OV 2 were improperly scored because he never had control of the police officer's weapon, and there was no evidence that he pointed it at anyone. However, the trial testimony shows the opposite – testimony showed that defendant grabbed an officer's gun and pointed it at another officer. OV 1 and OV 2 were properly scored.

III

Next, defendant challenges several of the trial court's jury instructions. Jury instructions are to be read as a whole, rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Instructions that are somewhat imperfect do not create error if they fairly present the issues and sufficiently protect the defendant's rights. *Id*. at 124. We find no error requiring reversal.

Defendant mischaracterizes the instructions at issue. Read as a whole, the trial court, in its instructions, merely expressed its concern with giving each side a fair chance to present its case. In any event, defendant fails to articulate how he was prejudiced by any instruction. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Furthermore, in light of the testimony that defendant failed to stop for the police and led them on both a car and foot chase, the flight instruction did not constitute "consideration of a charge unwarranted by the proofs." *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), overruled on other grounds in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998).

IV

As his fourth issue, defendant argues that there was insufficient evidence presented regarding his possession of the cocaine and his intent to deliver that cocaine. We disagree. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Possession with intent to deliver less than fifty grams of cocaine requires the prosecutor to prove, in relevant part, that the recovered substance was cocaine and that defendant knowingly possessed it with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, mod 441 Mich 1201 (1992). Intent to deliver "may be proven by circumstantial evidence and also may be inferred from the amount of controlled substance possessed." *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). On this issue, we agree with the following portion of the prosecutor's brief:

> As to the charge of possession with intent to deliver cocaine, Defendant overlooks the direct evidence of Clinton DeVooght. DeVooght testified that he knew Defendant as a supplier of illegal drugs, and that he had purchased such from him on four or five previous occasions. On this occasion DeVooght had given him $50.00 to buy drugs. After taking DeVooght's money, Defendant made at least one phone call, told DeVooght he would be back in 10 or 15 minutes, then left the apartment.
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> When Defendant was apprehended, Port Huron Police Officer Joel Wood testified that following a lengthy car chase, Defendant fled on foot. At the time, the officer observed Defendant holding onto his coat, as if he was attempting to keep something from falling out.
>
> Detective Scott VanSickle of the Port Huron Police Department testified that he was the evidence technician assigned to this case. He explained the [sic] he had recovered some evidence from the location where Defendant had been apprehended that nigh [sic]. He returned the following day with one of the Department's tracking dogs to retrace Defendant's path because such a search was difficult during the hours of darkness. While retracing the route of Defendant and the pursuing officers, VanSickle discovered a baggie containing seven rocks of crack cocaine. Port Huron Detective Joseph Platzer testified that this was considered a dealer's quantity of crack cocaine. He based this on his training and experience over six years with the Special Crimes Unit, including a two year assignment to the St. Clair County Drug Task Force. [Prosecutor's brief, pp 30-31.]

Based on this evidence, we conclude that, viewed in a light most favorable to the prosecution, there was sufficient evidence presented regarding defendant's possession and intent to distribute.

Defendant also argues that there was insufficient evidence that he committed armed robbery. Armed robbery consists of the following elements: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). The victim testified that defendant pointed a gun at the victim and told him he wanted all his money or he would shoot him. Defendant then took the victim's checkbook, identification, and money from his dresser drawer. Defendant attacks the victim's testimony, but we leave questions of credibility to the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

V

Finally, defendant argues that the prosecutor committed misconduct during trial and closing arguments. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370, abrogated on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Defendant has failed to show the prosecution's remarks constituted plain error affecting his substantial rights. The evidence introduced by the prosecutor was relevant and proper. Moreover, the prosecutor's comments during closing argument were supported by the

evidence, proper inferences from the evidence, or proper responses to defense counsel's arguments.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder